

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ISAAC SHEARDELL ABBY,

Defendant-Appellant.

UNPUBLISHED

June 5, 2001

No. 220267

Saginaw Circuit Court

LC No. 87-016109-FC

Before: Holbrook, P.J., and McDonald and Saad, JJ.

PER CURIAM.

The jury convicted defendant of assault with intent to do great bodily harm, MCL 750.84; MSA 28.279, possession of firearm by a felon, MCL 750.224f; MSA 28.421(6), and felony-firearm, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to two years' imprisonment for the felony-arm conviction, five to fifteen years for the assault with intent to commit great bodily harm conviction, and forty to ninety months for the felon in possession of a firearm conviction. Defendant appeals as of right, and we affirm.

I.

Defendant argues that the trial court erred in denying his motion for directed verdict because significant discrepancies between witness' testimony prevented a reasonable jury from finding he formed a specific intent to kill.

This Court reviews a decision on a motion for directed verdict to determine if the evidence, viewed in the light most favorable to the prosecutor, is sufficient to allow a rational trier of fact to find that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Mayhew*, 236 Mich App 112, 114; 600 NW2d 370 (1999).

Here, the prosecutor charged defendant with assault with the intent to commit murder, which requires proof of (1) an assault (2) with an actual intent to kill (3) which, if successful, would make the killing murder. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). In attempting to prove guilt, circumstantial evidence and the reasonable inferences derived from that evidence can constitute satisfactory proof of the elements of the crime. *Id.*

Defendant argues that the discrepancies between the police officer's and the complainant's testimony were sufficient to negate elements of the crime charged and preclude a reasonable factfinder from concluding that all the elements charged were proven beyond a reasonable doubt. However, beyond this cursory statement, defendant failed to expand on the argument. Instead, defendant supports his theory by incorporating arguments made to the court at the time of the motion and during closing arguments. *Id.* In essence, defendant has announced his position and now impermissibly leaves it to this Court to research and rationalize the basis of his claims. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997).

Notwithstanding, we conclude that, although there were inconsistencies in the witness' testimony, when all conflicts are resolved in favor of the prosecution, there is sufficient evidence from which to infer an intent to kill.

Defendant also contends that the trial court's failure to instruct on the requested lesser included misdemeanors was an abuse of discretion because the request was supported by the evidence and defendant's theory of the case. We disagree.

The decision whether to give a requested jury instruction is reviewed for an abuse of discretion. *People v Malach*, 202 Mich App 266, 276; 507 NW2d 834 (1994). Similarly, whether jury instructions are applicable to the facts of the case is within the discretion of the trial court. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998).

Generally, where an adequate request for an appropriate misdemeanor instruction is supported by a rational view of the evidence adduced at trial, the trial judge must give the requested instructions unless to do so would result in undue confusion, violation of due process, or some other injustice. *People v Stephens*, 416 Mich 252, 255; 330 NW2d 675 (1982). There are five conditions to this test. *People v Steele*, 429 Mich 13, 19; 412 NW2d 206 (1987). First a proper request must be made. *Id.* Second, there must be an appropriate relationship between the charged offense and the requested misdemeanor. *People v Hendricks*, 446 Mich 435, 444-445; 521 NW2d 546 (1994). Third, the requested misdemeanor instruction must be supported by a rational view of the evidence. *Steele, supra* at 20. Fourth, not relevant here, if the prosecutor requests the instruction, the defendant must have adequate notice of the misdemeanor charge as one against which he might have to defend. *Id.* at 21. Finally, the requested misdemeanor instruction cannot result in injustice or undue confusion. *Id.* at 21-22. The trial court is vested with substantial discretion in deciding whether the cause of justice would be served by the giving a misdemeanor instruction and cannot be reversed on appeal absent an abuse of discretion. *Id.* The failure to give an appropriate instruction is an abuse of discretion if a reasonable person would find no justification or excuse for the ruling made. *Malach, supra* at 276.

Defendant says that he properly requested the misdemeanor instruction because, although defendant adopted a theory of mistaken identity as his principal defense, he also raised an alternative defense of lack of intent due to extreme intoxication that was preserved when the court agreed to the intoxication instruction. Although defendant made a proper request and there was an appropriate relationship between the charged offense and the lesser misdemeanors, the request was not supported by a rational view of the evidence at trial. *Steele, supra*. Moreover, notwithstanding that the prosecutor's and defendant's theories conflict, neither theory supports the requested instruction because no evidence showed that defendant was simply reckless in

discharging a gun. The parties disputed defendant's level of intent when he fired the gun – whether he intended to kill or merely cause great bodily harm. However, this dispute was not sufficient to allow the jury to “rationally reject the existence of the greater offense and accept the existence of the lesser misdemeanor offense.” *Id.* at 21.

Additionally, the final prerequisite that the instructions not cause undue confusion or injustice is not established. The court intended to instruct the jury on the principal charge and three lesser included felonies. Any additional instructions would have confused the jury, could have caused a compromise verdict, and would be inconsistent with the policy goal of permitting an instruction on lesser included misdemeanors. *Steele, supra* at 18-19. Our Supreme Court in *Steele* said that it vested “substantial discretion in the trial judge in determining whether the cause of justice would be served by giving the lesser included misdemeanor instruction on the facts of any given case.” *Id.* at 22. We hold that the trial court did not abuse its discretion and moreover was correct in denying defendant's request for misdemeanor instructions.

Finally, defendant claims his sentence was disproportionate, though it is within the sentencing guidelines' recommended range.

The trial court sentenced defendant to a minimum of sixty months' imprisonment for his conviction of assault with the intent to do great bodily harm, MCL 750.84; MSA 28.279, and now argues that the sentence, although within the guidelines, is disproportionate because the sentencing court ignored circumstances peculiar to the offense and the offender. This position is not supported by the record. Additionally, a defendant who claims that a sentence falling within the guidelines is disproportionate must articulate those unusual circumstances either at sentencing or on appeal. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992). Defendant presented no unusual circumstances, and a defendant's employment, lack of criminal history, and minimum culpability are not unusual circumstances that would overcome this presumption. *People v Daniels*, 207 Mich App 47, 54; 523 NW2d 830 (1994).

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Gary R. McDonald
/s/ Henry William Saad